

## Motion Practice Highlight

DUI: BAC & Beyond

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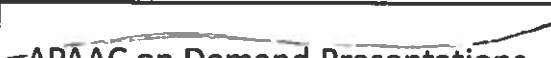
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## APAAC on Demand Presentations

- **Basic Motion Practice**
  - The Rules (pre & post-trial)
  - Substantive – Rule 8, voluntariness, *Miranda*, right to counsel
  - Suggestions for evidentiary hearings
- **Corpus Delicti Rule**
  - The standard
  - Motions in limine
  - Hearsay
  - DUI
- **Search & Seizure for Traffic Cases**
- **Discovery**
  - Overview
  - Responding to defense motions to compel & for sanctions
- (Hot Topics - APC)

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## General Reminders

### Know & Use the Rules & Comments

- ✓ Rule 15.7(b)
  - no sanctions hearing w/o good faith certificate
- ✓ Rule 15.2(a)(8)
  - Def. shall at any time submit to reasonable physical exam (HGN)
- ✓ Rule 32
  - time limits & preclusion
  - summary disposition – Rule 32.6(c)
- ✓ Rules specific to your issue

**Includes *Miranda* but NOT Voluntariness**

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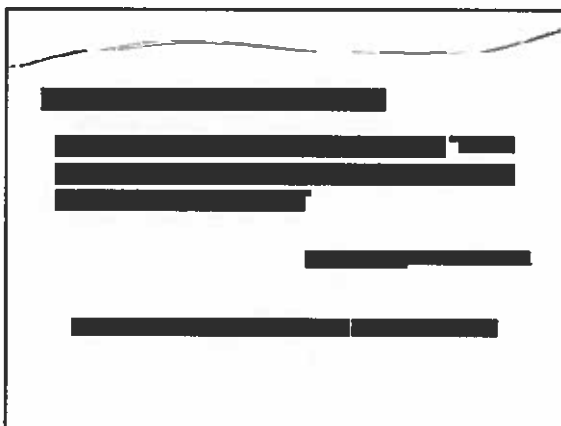
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## Be Proactive

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## Common Motions *in limine*

- Absent State's criminalist
  - *Rogovich; State v. Karp (Voris, RPI) 236 Ariz. 120 (App. 2013)*
- Medical marijuana – never relevant
- Prescription drug cases – hearsay, relevance
- Micro clots
- *Corpus Delicti*
- Preclude intent arguments – APC & Marijuana cases
- *Guthrie/Cooperman*
  - 2100/1, RFI, breathing pattern, temp, source code, etc.
- Be pro-active

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## Keen

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## Second Sample - *KEEN*

If defendant:

- 1) requests & obtains a sample for his/her own use &/or
- 2) attacks validity of State's test

State may:

- \* cross-examination about receiving second sample, &
- \* comment on defendant's failure to produce evidence of second sample results at trial (reasonable inference).

*State ex rel. McDougall v. Corcoran (Keen, RPI), 153 Ariz. 157 (1987).*

If they test and notice an expert file motion for disclosure.

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## *Keen*

- Make sure there is enough blood left for testing before making this argument




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## Responding to Defense Motions

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## Don't Automatically Buy Into Defense Arguments

- Evaluate With a Critical Eye
- Examples of Erroneous Defense Arguments:
  - Rule 702 applies to FSTs, entire DRE examination, NHTSA cues, etc.
  - State has to collect a sample of blood for defendant
  - Uncertainty budget affects admissibility
  - Due diligence & Rule 8
- \* \* Shape the Issue on Appeal

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## 4<sup>th</sup> Amendment Reminders:

Ask - Does the 4<sup>th</sup> Amendment Apply?

- 1) Did Defendant have an expectation of privacy?
- 2) Was there a search or seizure?
- 3) Was there State action?

If so - was it reasonable, is there a warrant exception, good faith?



Remedy is suppression - not dismissal

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## [REDACTED]

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## Stop of Vehicle Reminders

### ☒ Community Caretaking

- *State v. Becerra*, 231 Ariz. 200 (App. 2013).
- *State v. Organ*, 225 Ariz. 43 (App. 2010).
- *State v. Mendoza-Ruiz*, 225 Ariz. 473 (App. 2010).

### ☒ Provide ALL Reasons/Support for Stops

- Avoid *Livingston* situations argue:
  - Title 28 AND
  - Impairment, community caretaking etc.




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## Motions to Suppress Breath/Blood Tests

- All State is required to do is lay basic foundation. All remaining issues go to weight, not admissibility, of evidence.

*State v. Plew*, 155 Ariz. 44 (1987); *State v. Superior Court (Weant, RPI)*, 172 Ariz. 153 (App. 1992).

A.R.S. § 28-1323 (B)

Blood = chain of custody & qualified person (not foundational)

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## Is It A Question of Fact?

- Did it or did it not happen?
- ALL questions of fact are for the jury!
  - gum in defendant's mouth
  - deprivation period issues




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## Battle of the Experts

- Disagreements between experts go to weight, not admissibility. *State v. Velasco*, (Alday, RPI), 165 Ariz. 480, 486 (1990).
- Where there is a lack of unanimity in scientific community on accuracy of breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." *State v. Olivas*, 77 Ariz. 118 (1954).

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### Battle of the Experts

- The determination of the credibility of witnesses is a question for the jury.

*State v. King*, 213 Ariz. 632 (App. 2006)

*State v. Rivera*, 116 Ariz. 449 (1977)

Rule 702 Comments

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### Deprivation Period

- "[A] failure to continuously observe a defendant continuously for 20 minutes prior to the administration of the test goes to the weight to be accorded the results of the test." *State v. Corrales*, 135 Ariz. 105, 106 (App. 1982).
- Deprivation period is contained on the check list. A.R.S. § 28-1323(A)(4) specifically states testimony of operator is sufficient to establish this requirement. *State v. King*, 213 Ariz. 632 (App. 2006)

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### Problems After the Test (Missing/Defective SQAPs)

Only need periodic records.

*State v. Duber*, 187 Ariz. 425 (App. 1996); *State v. Superior Court (Stock, RPI)*, 181 Ariz. 202 (1995).

ARS § 28-1323(A)(5)

- Bracketing calibrations on breath card
- Calibrations
- SQAPS
- Testimony of criminalist

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## Independent Chemical Test

No requirement to advise defendant of this right, unless State chooses:

- 1) not to invoke implied consent law; and
- 2) not to conduct chemical test.

*Montano v. Superior Court*, 149 Ariz. 385 (1986);  
*Mack v. Cruikshank*, 196 Ariz. 541 (App. 1999).

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## What if I Lose?

Appeal, Special Action, Proceed Anyway

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## Suppressed Evidence

Cannot use Constitution as a Shield  
& a Sword

*Harris v. New York*, 401 U.S. 222 (1971);  
*United States v. Havens*, 446 U.S. 620 (1980);  
*State v. Menard*, 135 Ariz. 385 (App. 1983);  
*State v. Fortier*, 149 Vt. 599, 547 A.2d 1327 (1988).

Use suppressed evidence  
to impeach.




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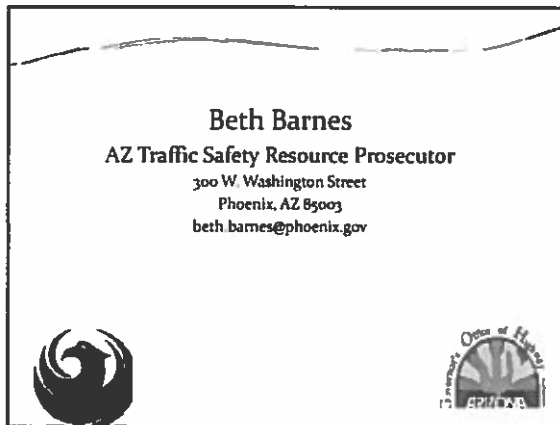
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